No. 15,485

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

BARNEY A. GERTZ, Owner of 3,827 Coins Being Likenesses of the 1847 "Hapa Haneri" Issued by the Hawaiian Government,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

APPELLEE'S BRIEF.

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

Appellee accepts the Statement of Pleadings and Facts Disclosing Jurisdiction contained in Appellant's Opening Brief (pages 1-2).

Appellee likewise accepts the general Statement of the Case contained in Appellant's Opening Brief (pages 2-3).

APPELLANT'S STATEMENT OF FACTS AND COMMENTS THEREON.

Appellant's Statement of Facts (pages 5-6) contains statements substantially as follows:

(1) On February 7 and 9, 1956, the Special Agent in Charge, U. S. Secret Field Force, seized 3,827 discs which Appellee had in his possession with intent to sell or otherwise dispose thereof, which statement Appellee admits is correct.

(NOTE: One of such discs was introduced in evidence as Appellant's Exhibit 7.)

(2) The Kingdom of Hawaii was an independent sovereign nation until 1898, when its independent status terminated by annexation to the United States; and in 1900 the Congress of the United States enacted the Hawaiian Organic Act which establishes a Territorial Form of Government for Hawaii, which statements Appellee admits are correct.

(3) The seized discs are likenesses of the Hapa Haneri Coin, a genuine coin issued as money in 1847 under authority of the Kingdom of Hawaii.

Appellee admits as correct the statement that the genuine Hapa Haneri Coin was issued as money in 1847 under authority of the Kingdom of Hawaii, but denies the statement that the seized discs are likenesses of such genuine coin, and contends that they are not likenesses thereof.

(NOTE: The Trial Court both in its decision (R 77) and in its Judgment and Order Returning Seized Property to Owner (R 19) found that "the evidence is convincing that the respondent coins are likenesses or similitudes of the 1847 Hapa Haneri".)

Appellee submits that no evidence was introduced to support such finding, but that on the contrary the only evidence introduced was that of Appellant's own witness, H. E. Bauer, whose testimony established that there is no such likeness or similitude.

This witness was shown several genuine Hapa Haneri Coins minted in 1847 (introduced in evidence as Appellant's Exhibits 1 to 6 inclusive) and one of the seized discs (introduced in evidence as Appellant's Exhibit 7). Said Exhibits 1 to 6 are Hapa Haneri Coins of the 1847 mintage (R 51 to 55). Shown Exhibit 7 his testimony was as follows:

> "A. * * * This is a metal. I wouldn't call that a coin. It is different metal, different color, different weight, and, also, the reverse is the same as the obverse of the coin, while on other coins it is just the opposite, you know. And then I can see down here 'Souvenir of Hawaii.' That is (34) not a coin; that is just a fake or metal, whatever it is.
>
> Q. That is not a genuine Hapa Haneri?
>
> A. No, that is not.
>
> Q. Taking Exhibit 4, you say that one of the differences is the back and the face are not reversed, is that correct?
>
> A. Yes. Now, you see, in this coin here, if you turn it over that is upside down—that is up, and here it is upside down.
>
> Q. You are referring to Exhibit 4 as having the face of one side being upside down in relation to the other side, is that correct?
>
> A. The other side. And here they are both alike.

Q. In connection with the one you say is not a Hapa Haneri, the top side is the same as on the bottom side, the same on both sides?

A. That is absolutely right. I don't think that any collector can ever be fooled or any dealer can be fooled by that thing." (R 56.)

"Q. Now, this coin, Mr. Bauer, Plaintiff's No. 7, I show it to you again and ask you in your mind do you think that anybody could be fooled by that coin?

A. I don't think so. Absolutely no. I mean, naturally, I suppose if a stranger came over and is Hell-bent—excuse me—he wants to get a Hapa Haneri, you know—but if he turns it over and sees on there 'Souvenir' . . .

Q. You mean these big letters on the bottom here?

A. Yes, I can see them. I don't need the magnifying glass. I can see that it is there. And I don't think anybody (37) can be fooled by that.

Q. Nobody would be fooled?

A. I don't think so." (R 58-59.)

OMISSIONS IN APPELLANT'S STATEMENT OF FACTS.

The following facts proved by uncontradicted evidence and omitted from Appellant's Statement of Facts are decisive in establishing that possession of the seized discs was not in any sense a violation of the provisions of 18 U. S. C. § 489:

(1) On May 10, 1847, G. P. Judd, Minister of Finance of the Kingdom of Hawaii, issued the following proclamation:

"Pursuant to the provisions of Chapter 4, Part 3, of the Act to Organize the Executive Departments, the undersigned has 'caused to be minted for circulation a copper coin as described in the first section of (11) that chapter,' which he has put into circulation as therein prescribed to the extent of an issue of $1,000.

"Said coin will be accordingly henceforth received *throughout this kingdom and at this department* 'in payment of government dues, duties and taxes, and in tender or payment of debts contracted by private individuals' at the value of 100 of said coins to the dollar. G. P. Judd, Minister of Finance." (R. 34-5; italics supplied.)

(NOTE: The copper coin referred to was the Hapa Haneri.)

(2) In 1956 the Hapa Haneri was not in circulation and would not be accepted in circulation; and since 1900 no coin of the former Kingdom of Hawaii could be passed at all; and such coins are no longer redeemable. (Testimony of Appellant's Witness, H. E. Bauer, R 59-60.)

The foregoing facts establish that coins of the former Kingdom of Hawaii, including the Hapa Haneri, since 1900 have not been current and have not been in use as money in Hawaii or elsewhere.

In this connection the evidence shows that the Hapa Haneri is a museum piece.

Appellant's Witness, Mr. Clarence Hohu, testified (R 37-42) that the genuine Hapa Haneris (introduced in evidence as Appellant's Exhibits 1-6) are kept in

the Bishop Museum, the official repository of the Territory of Hawaii for such items; and Appellant's Expert Witness, H. E. Bauer, testified that the Hapa Haneri "is getting now rather scarce." (R 47.)

SPECIFICATION OF ERROR IN THE TRIAL COURT'S DECISION AND JUDGMENT.

As previously noted the Trial Court in both its Decision and Judgment found that "the respondent coins are likenesses or similitudes of the 1847 Hapa Haneri."

The Court erred in this finding which, although a dictum in view of the Court's decision, nevertheless is specified as error.

SUMMARY OF ARGUMENT.

I. 18 U.S.C. § 489 prohibits the making or possession of likenesses or similitudes of coins of an existing foreign country with which the United States is at peace, but does not prohibit the making or possession of anything in the likeness or similitude of coins of a nonexisting former foreign country.

II. There is no evidence to support the dictum of the District Court that the discs possessed by the Appellee are likenesses or similitudes within the meaning of 18 U.S.C. § 489 of the Hapa Haneri coin of the nonexistent former Kingdom of Hawaii which was minted in 1847 and went out of circulation as money in 1898.

ARGUMENT.

I. SECTION 18 U.S.C. § 489 DOES NOT PROHIBIT THE MAKING OR POSSESSION OF ANYTHING IN THE LIKENESS OR SIMILITUDE OF COINS OF A NONEXISTING FORMER FOREIGN COUNTRY.

Appellant's fundamental contention stated without qualification in its Summary of Argument is:

> "The plain meaning of 18 U.S.C. § 489 prohibits the making of likenesses of any coins of a foreign country *whether such country is currently in existence or not*" (page 6; italics supplied).

Under such construction, the Section would prohibit the making or possession (and here only possession is involved) of discs in the likeness or similitude of the stater of Ancient Carthage, the denarius of Ancient Rome, the sheckel of the Ancient Kingdom of Judea and the coins of every other country that formerly existed, irrespective of the time when its existence ceased.

In its decision that Section 489 does not prohibit the possession of a devise or token in likeness or similitude of a coin of a nonexistent country such as the former Kingdom of Hawaii, the District Court states:

> "An early case, United States v. Arjona, 120 U.S. 479 (1887), points up the need for and validity of laws of the United States which protect the integrity of money, notes or other securities issued by or under the authority of foreign sovereign governments. The rationale of that case, coupled with the definition of 'foreign government' found in 18 USCA § 11, led to the conclusion that respondent coins were not issued as money under the authority of a foreign government contrary to the provisions of Section 489." (R 17.)

Appellant argues that the "*Arjona* Case, if relevant at all, cannot be controlling, when Congress enacted the predecessor of 489 a number of years after the *Arjona* Case was decided by the Supreme Court of the United States." (page 10.)

Such case is both relevant and controlling, because every statute, enacted subsequent to the decision, which prohibits the making or possession of coins in likeness or similitude of foreign coins must be construed and interpreted in view of the constitutional right of Congress to enact such legislation, as stated in the decision.

The Defendant Arjona was indicted for violating an act of Congress making felonious the counterfeiting in the United States of a note issued by a bank of a foreign country intended by law or usage of the foreign country to circulate as money.

Defendant demurred to the indictment on the ground that such counterfeiting cannot constitutionally be made an offense against the law of nations.

The Judges of the lower Court, being in disagreement, certified to the Supreme Court of the United States the question:

> "Whether the counterfeiting within the United States of the notes of a foreign bank or corporation can be constitutionally made by Congress an offense against the law of nations" (120 U.S. 479: Column 1).

Chief Justice Waite in an exhaustive decision stated:

> "The law of nations requires every national government to use 'due diligence' to prevent a wrong

> being done within its own dominion to another Nation *with which it is at peace,* or to the people thereof; and because of this the obligation of one Nation to punish those who, within its own jurisdiction, counterfeit the money of another Nation has long been recognized." (Italics supplied.)

No statement could be more definite; and all subsequently enacted statutes such as 18 U.S.C. § 489, must be interpreted, construed and limited in application to conform thereto.

18 U.S.C. § 11 to which the District Court refers in the portion of its decision above quoted provides:

> "The term 'foreign government,' as used in this title, includes any government, faction or body of insurgents within a country *with which the United States is at peace,* irrespective of recognition by the United States." (Italics supplied.)

The Section here involved, 18 U.S.C. § 489, provides with reference to foreign coins as follows:

> "Whoever, within the United States makes . . . or possesses with intent to sell, give away, or in any other manner use the same, . . . any token, devise, print or impression, or any other thing whatsoever, in the likeness or similitude as to design, color or the inscription thereon of any of the coins . . . of any foreign country issued as money, . . . under the authority of any foreign government, shall be fined. . . ."

Appellant argues (page 10):

> "But it should be noted that both the terms 'foreign country' and 'foreign government' are used in Section 489. The term 'foreign country'

> controls the issue here. The terms are obviously not synonymous. The definition of 'foreign government' will not restrict the term 'foreign country' or control the issue here."

On the contrary, in those sections of Chapter 25 of 18 U.S.C. (captioned "Counterfeiting and Forgery") which deal with foreign coinage, the terms "foreign country" and "foreign government" are used interchangeably and synonymously.

To Particularize:

In Section 478, the subject matter of which is counterfeiting securities, the term used is "foreign government";

In Section 480, the subject matter of which is possession of a foreign security, the term used is "foreign country";

In Section 481, the subject matter of which is having plates from which money may be printed, the term used is "foreign government";

In Section 482, the subject matter of which is counterfeiting bank notes, the term used is "foreign country";

In Section 484, the subject matter of which is piecing together parts of currency, the term is "foreign government";

In Section 486, the subject matter of which is uttering coins, the term used is "foreign countries";

In Section 488, the subject matter of which is the making of molds, the term used is "foreign government."

The Section here involved, 489, uses both the terms "foreign country" and "foreign government," but those terms, as generally in the other sections last referred to, are used interchangeably; and the section would be exactly the same in meaning did it read:

> "Whoever within the United States makes . . . or possesses . . . any token, devise, print or impression, or any other thing whatsoever, in the likeness or similitude as to design, color or inscription thereof of any of the coins . . . of any *foreign government"* (instead of *foreign country*) "issued as money, . . . under the authority of *such"* (instead of any) "foreign government, shall be fined. . . ."

Futhermore, the Section would be exactly the same did it use the word *Nation* (as did Chief Justice Waite in the *Arjano* Case) instead of either the word *country* or *government.*

Appellant further contends (page 12) that limiting the application of Section 489 to foreign countries with which the United States is at peace would lead to the "absurd result" that there would be excluded from its application countries between whom and the United States a state of war exists.

In the *Arjano* Case the United States Supreme Court did not regard such result as "absurd," for in its decision it provided that the Congress may constitutionally enact legislation which prohibits the counterfeiting of money of "another country with which it" (the United States) "is at peace."

Furthermore, that the terms *foreign government* and *foreign country* are synonymous and inter-

changeable in the Sections of 18 U.S.C. Chapter 25 is conclusively established by the provisions of 18 U.S. C. § 492, which furnishes the sole authority for seizure and forfeiture of articles the making or possession of which is prohibited by the twenty-one preceding Sections of said Chapter.

Said Section 492 employs the term *foreign government:* nowhere therein does the term *foreign country* appear.

Accordingly, were not *foreign government* synonymous and interchangeable with *foreign country* throughout said Chapter 25, then said Section 492 would contain no authority whatsoever for seizure and forfeiture of articles the making or possession of which is prohibited by those Sections of Chapter 25 in which the term *foreign country* and not *foreign government* is employed.

Said Section 492 would have been exactly the same had it used the term foreign country, or the term foreign *Nation,* as did the United States Supreme Court in the *Arjano* case.

Appellant's Brief (Page 9) notes that Section 489 "is not an absolute prohibition" and that permission for the possession of likenesses of foreign coins may be obtained from the Secretary of the Treasury.

Such permission is required for possession of likenesses of foreign coins that come within the scope of the Section, to-wit: coins of an existing foreign Nation with which the United States is at peace; but surely it cannot be contended that such provision has

any application to permission for the possession of likenesses of coins of a nonexisting former Nation, which, as submitted, do not come within the Section's scope.

Finally, in this connection it should be noted that 18 U.S.C. § 11 defines a foreign government as that of "a country with which the United States *is* at peace." (Italics supplied.)

The United States *was* at peace with the Kingdom of Hawaii up to 1898, but by no stretch of the imagination can it be considered a country with which the United States *is* at peace when its very existence terminated fifty-eight (58) years ago.

It is submitted that the District Court was correct in deciding that the rationale of the *Arjona* Case coupled with the definition of "foreign government" found in 18 U.S.C. § 11 leads to the conclusion that possession by the Appellee of the discs in question was not within the prohibition of said Section.

While it is believed the foregoing considerations are decisive in support of Appellee's position, nevertheless it may not be amiss to consider the general intent of the Congress in enacting Chapter 25 of Title 18 U.S.C. captioned "Counterfeiting and Forgery."

Obviously, it was to prohibit acts which would or could defraud or deceive the government and/or the public.

Such deception could result in the possession of coins in the likeness or similitude of coins of an existing foreign country, and accordingly Section 489

prohibits such possession, but could the Government or the public possibly be deceived by the possession of something in the likeness or similitude of the coins of a country which long since has ceased to exist?

It is submitted that such question answers itself in the negative, and that such answer applies forcibly to the possession in 1956 of discs in the likeness of a coin issued in 1847 by the former Kingdom of Hawaii, whose very existence as a country permanently ceased in 1898.

II. HOWEVER, EVEN DID 18 U.S.C. § 489 PROHIBIT THE POSSESSION OF SOMETHING IN THE LIKENESS OF A COIN OF A NONEXISTING FORMER FOREIGN COUNTRY OR GOVERNMENT, NOTWITHSTANDING, THE SEIZED DISCS WOULD NOT COME WITHIN SUCH PROHIBITION, AS THEY ARE NOT SUCH LIKENESSES OF THE HAPA HANERI OF THE FORMER KINGDOM OF HAWAII AS THE SECTION CONTEMPLATES.

Section 5430 of Revised Statutes of the United States prohibited the possession of "any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same . . ."

United States v. Fitzgerald, 91 Fed. 374: Defendant Fitzgerald was indicted for the possession of a paper alleged to be in the likeness of an obligation of the United States.

The Court instructed the jury that to find the defendant guilty it must find that the paper is "in the similitude of some obligation of the United States," and further:

> " * * * the similitude must be in such a degree as to furnish a resemblance so near to the government obligations or securities that *it could be used to deceive a person of ordinary intelligence, who is acting with ordinary care, in a business transaction.* The resemblance is sufficient for the purpose if you believe that it would probably deceive a person taken unawares, in dealing with a person whom he believed was acting honestly. If it could be so used against a person of that kind, when unsuspecting or unwary, as to deceive him, and be effectual to commit a fraud, then it would be in the similitude as intended by this statute." (Pages 375-6; italics supplied.)

United States v. Kuhl, 85 Fed. 624: Defendant Kuhl was indicted under the same statute. The syllabus 2 states the conclusion of the Court as follows:

> "The 'similitude' contemplated in Rev. St. § 5430, which makes criminal the having in one's possession, with intent to sell or use the same, 'any obligation or security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States,' is such a likeness or resemblance as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary care and observation, when dealing with a supposed honest man."

The same rules must apply in determining whether the seized discs are in the likeness or similitude of the Hapa Haneri.

Concerning this, the only evidence before the District Court was that of Appellant's own witness, H. E. Bauer.

His uncontradicted evidence, hereinbefore set forth under the caption "Appellant's Statement of Facts and Comments Thereon" was in substance as follows:

(a) The seized disc (Appellant's Exhibit 7) differs from the Hapa Haneri in its metal, its color which is golden instead of copper, and its weight;

(b) In the Hapa Haneri its back face is upside down with reference to its front face, whereas in the seized disc there is no such difference between the front and back faces;

(c) The seized disc is stamped "Souvenir"; and

(d) No one could be fooled into believing that the seized disc is a genuine Hapa Haneri.

These differences were requested by the Appellee in ordering the making of the discs, as shown by his testimony:

> "We requested that they use a golding metal so it wouldn't be confused, the faces being reversed, and also the word 'Souvenir' being put on the bottom; also, there is 'Alii of Hawaii,' and that is a trade-mark on the back of it." (R 67.)

To support the Court's finding, which is but dictum, "that the respondent coins are likenesses or similitudes of the 1847 'Hapa Haneri'," the likeness or similitude must be such as "to deceive a person of ordinary intelligence, who is acting with ordinary care, in a business transaction," as stated in *United States v. Fitzgerald* (supra).

There is no evidence to support such finding: on the contrary the evidence of Appellant's own witness is to the effect that no one could be so deceived.

CONCLUSION.

It is respectfully submitted that the Judgment of the District Court should be affirmed.

Dated, San Francisco, California,
June 17, 1957.

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